

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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UNITED STATES OF AMERICA,

Plaintiff,

v.

VICTOR H. OROZCO,

Defendant.

Case No. 3:13-cr-00048-MMD-WGC

ORDER

(Def's Motion to Suppress Evidence and
Statements – dkt. no. 31)

I. SUMMARY

Before the Court is Defendant Victor H. Orozco's Motion to Suppress Evidence and Statements ("Motion"). (Dkt. no. 31.) For the reasons discussed herein, the Motion is denied.

II. BACKGROUND

A. Procedural History

Orozco is charged with two counts of possession with intent to distribute controlled substances and one count of smuggling goods into the United States. (Dkt. no. 16.)

Orozco filed the Motion (dkt. no. 31), and the Government filed a response (dkt. no. 40). Subsequent to the filing of the Motion, Orozco's counsel withdrew and he was appointed new counsel. (Dkt. no. 42.) The Court denied the Motion without prejudice in order to give new counsel the opportunity to review discovery material. (Dkt. no. 50.) At the request of Orozco's counsel, the Court then reopened the Motion and granted Orozco time to file a reply. (Dkt. no. 62.) Orozco filed a reply. (Dkt. no. 64.) The Court

1 held an evidentiary hearing over the course of two (2) days regarding the Motion (dkt.
2 nos. 72, 73) and the parties filed post-hearing briefs (dkt. nos. 76, 77). The Court
3 subsequently held one final day of evidentiary hearing in which Orozco called his final
4 witness. (Dkt. no. 79.)

5 **B. Relevant Factual Background**

6 The following facts are taken from Trooper Zehr's testimony, Trooper Boynton's
7 testimony and Trooper Zehr's police report.

8 On April 27, 2013, Trooper Zehr was on active patrol in a fully marked Nevada
9 Highway Patrol ("NHP") unit on US 6 in White Pine County, Nevada. (Dkt. no. 69, Exh.
10 A.) He initiated a traffic stop of a commercial tractor trailer being operated by Orozco.
11 (*Id.*) The tractor trailer had a red tractor, white box trailer and Michigan plates. (*Id.*)
12 Trooper Zehr initiated the stop in order to conduct a North American Standard (NAS)
13 level III safety inspection. (*Id.*) He also initiated the stop because of information he
14 received from Detective Sergeant Brewer, with the Nevada Division of Investigations
15 (NDI), "who advised that he had received a source of information that . . . there was a
16 commercial motor vehicle possibly engaging in criminal activity and could possibly have
17 drugs in the vehicle" and that said vehicle had a red tractor and Michigan plates. (Dkt.
18 no. 74 at 24:25; 25:1-23.) Trooper Zehr and Trooper Boynton, also present at the time of
19 the stop, had received updates as to the expected travel time of said vehicle and were
20 waiting for its arrival.¹ (Dkt. no. 75 at 215, 218-20.)

21 Trooper Zehr approached Orozco from the passenger's side of the tractor with
22 Trooper Boynton. (*Id.* at 176:10-19.) When Trooper Zehr first approached Orozco, he
23 observed that Orozco appeared nervous. (Dkt. no. 69, Exh. A; dkt. no. 74 at 27:21-25;

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26 ¹On the final day of the evidentiary hearing, Sergeant Brewer testified that he had
27 received a call from "the tipster" on April 26, 2013, indicating that the tractor trailer was
28 delayed and a subsequent call informing him of the vehicle's expected travel time on
April 27, 2013. Sergeant Brewer testified that he provided this information to Trooper
Zehr by telephone.

1 28:1-8.) Trooper Zehr also noticed “religious items” in the tractor and an “overwhelming
2 air freshener smell.” (Dkt. no. 74 at 100:3-17.)

3 Trooper Zehr asked Orozco for his license and paperwork for a commercial
4 vehicle inspection. (Dkt. no. 69, Exh. A.) The paperwork Orozco provided included a
5 lease agreement. (Dkt. no. 74 at 32:3-7.) Trooper Zehr and Trooper Boynton noticed that
6 the lease agreement conflicted with Orozco’s statement that he owned the company and
7 further noticed that the exterior of the truck did not indicate that it was leased and also
8 did not indicate what company Orozco was operating under. (*Id.*; see *also* dkt. no. 75 at
9 198:6-17.) The paperwork Orozco provided also included his logbook. (Dkt. no. 74 at
10 15:1-16.) Trooper Zehr noticed that Orozco’s logbook entries appeared to be missing
11 required information, making it difficult to determine how long Orozco had been on the
12 road and whether he was concealing hours of service. (Dkt. no. 69, Exh. A; dkt. no. 74 at
13 34:21-25; 35:1-10.) He also noticed the log book indicated that Orozco had a co-driver,
14 which appeared to be inconsistent with the identified downtime and sleep berth time.
15 (Dkt. no. 74 at 36:4-19; 49:18-25; 50:1-3; 55:15-18.) Troopers Zehr and Boynton also
16 believed the presence of a co-driver was inconsistent with the amount of time it took
17 Orozco to travel from Washington to Nogales, AZ, which further indicated that time might
18 have been concealed. (*Id.* at 55:2-10; 61:15-18; dkt. no. 75 at 180:3-25; 190:21-23;
19 191:2-6.) Shipping papers are routinely examined in an inspection. (Dkt. no. 75 at 186.)
20 In trying to determine when loads were picked up and dropped off, Troopers Zehr and
21 Boynton noticed that shipping papers provided by Orozco indicated that he picked up his
22 load of watermelons on a day that he was, according to his logbook, off-duty. (Dkt. no.
23 74 at 42-43; dkt. no. 75 at 186-88.)

24 After going over the logbooks and papers with Orozco for approximately twenty
25 (20) minutes, Trooper Zehr walked away from the tractor and spoke on the phone to
26 Trooper Barney, who was waiting within a mile, to discuss a canine sniff of the tractor
27 trailer. (Dkt. no. 74 at 53-54.) He did so because he was suspicious of criminal activity
28 and wanted to have the “resources available” to investigate criminal matters. (*Id.* at

1 55:23-25; 56:1-7.) Trooper Zehr returned to his patrol car and ran a license check and
2 criminal history check with dispatch. (*Id.* at 59-60.) During this time, Trooper Boynton
3 was still speaking with Orozco. (*Id.* at 59:10-23.)

4 Approximately thirty (30) minutes after the initial stop, Trooper Boynton walked
5 back to Trooper Zehr's patrol car and discussed his confusion regarding Orozco's co-
6 driver. (Dkt. no. 75 at 193:5-13.) Trooper Boynton walked back to the tractor to question
7 Orozco about the co-driver and was called back by Trooper Zehr who asked him to see if
8 he could spot any "indicators" of criminal activity inside the cab of the tractor. (Dkt. no. 74
9 at 67-68; dkt. no. 75 at 192-193.) Trooper Zehr called his sergeant and discussed
10 whether or not he has "reasonable suspicion" to hold Orozco longer and also discussed
11 "rolling into" asking Orozco for consent to search his tractor trailer once the inspection is
12 complete. (*Id.* at 71:1-25; 72:1.) At this time, Trooper Barney looked at the tractor and
13 was "on the phone with the El Paso Intelligence Center ("EPIC"), and making inquiries
14 [as] to the company, the tractor and the trailer, and the driver." (*Id.* at 70:17-22.)

15 Approximately forty (40) minutes after the initial stop, Trooper Boynton walked
16 back to Trooper Zehr's patrol car and told Trooper Zehr that he was still confused. (*Id.* at
17 72-73; dkt. no. 75 at 195:22-25; 96:1-7.) Trooper Zehr testified they were confused over
18 "[w]hether or not [Orozco] had two trucks, whether or not he had more drivers, where his
19 other trucks were, and how the truck that Mr. Orozco claimed he had the additional truck
20 that he claimed he had, how it got from Washington to Nogales." (Dkt. no. 74 at 73:5-8.)
21 Trooper Zehr asked other officers to leave so that there would not be an "overwhelming
22 presence of law enforcement" when he asks Orozco for consent to search his tractor
23 trailer. (*Id.* at 75:1-3.) Trooper Boynton received information from Trooper Barney, based
24 on information from EPIC, that Orozco had made border crossings, and Trooper Boynton
25 compared that information with the logbook entries. (*Id.* at 78:1-8; 78:21-24; dkt. no. 75
26 at 196:8-15.)

27 Approximately fifty (50) minutes after the initial stop, Trooper Zehr was finishing
28 the inspection paperwork. (Dkt. no. 74 at 83:9-14.) Trooper Boynton asked Orozco to

1 step out of the tractor and asked him about the border crossings. (Dkt. no. 75 at 200-02.)
2 Orozco initially denied that he had crossed the border but changed his answer and
3 admitted he did cross the border the previous day. (*Id.*) Trooper Zehr finished his
4 paperwork and decided to not write up Orozco for any violations, though he believed
5 some violations to have been committed, including form and manner of the logbook and
6 fictitious log entries. (Dkt. no. 74 at 85:17-25; 86:1-7.) Trooper Zehr gave Orozco the
7 inspection form and all of his paperwork back. (Dkt. no. 69, Exh. A.) With only Trooper
8 Boynton present, Trooper Zehr asked Orozco for consent to search the tractor trailer.
9 (Dkt. no. 74 at 88-93.) In addition to providing verbal consent, Orozco signed the form
10 that explained the consent to search, which Trooper Zehr provided him. (*Id.*; dkt. no. 69,
11 Exh. A) After signing the form, Orozco went and got the key to his trailer. (Dkt. no. 74 at
12 91:12-14.)

13 Trooper Barney then arrived with a K9, who made a positive alert. (Dkt. no. 69,
14 Exh. A.) Trooper Zehr again asked Orozco for his consent to search and Orozco verbally
15 consented. (*Id.*) Trooper Zehr located a black duffle bag in Orozco's sleeper berth, which
16 contained what appeared to be drugs. (*Id.*)

17 **III. DISCUSSION**

18 Orozco argues the following: (1) the administrative inspection stop was pretextual;
19 (2) the stop exceeded the scope of an administrative inspection without reasonable
20 suspicion; and (3) Orozco's consent to search was not knowingly, intelligently and
21 voluntarily given. (See dkt. no. 76; see also dkt. no. 74 at 11:4-13.)

22 The Court begins its analysis with Nevada's administrative inspection program.
23 The Ninth Circuit in *United States v. Delgado*, 545 F.3d 1195 (9th Cir. 2008) holds that
24 states may establish statutes for administrative warrantless inspection of commercial
25 vehicles in accordance with the three-factor analysis in *New York v. Burger*, 482 U.S.
26 691 (1987), even where said statutes allow for unfettered discretion in conducting
27 inspections without first observing a regulatory violation. *Delgado*, 545 F.3d at 1201-03.
28 Nevada has adopted statutes allowing for warrantless administrative searches of

1 commercial vehicles. Nevada's statute defines the NHP's duties to "include, without
2 limitation . . . [t]o enforce the provisions of laws and regulations relating to motor carriers,
3 the safety of their vehicles and equipment, and their transportation of hazardous
4 materials and other cargo." NRS § 480.360(4). Such "laws and regulations" in turn
5 include "the regulations contained in 49 C.F.R. Parts 40, 382, 383, 385, 387, 390 to 393,
6 inclusive, 395, 396 and 397, and Appendices B and G of 49 C.F.R. Chapter III,
7 Subchapter B[.]" NRS § 706.173; NAC 706.247(1). Under Nevada's statutory scheme,
8 the NHP may work in conjunction with the DMV to enforce NRS § 706.171(1)(d), which
9 states that they may "[e]xcept as otherwise provided in this section, examine, at any time
10 during the business hours of the day, the books, papers and records of any fully
11 regulated carrier, and of any other common, contract or private motor carrier doing
12 business in this State to the extent necessary for their respective duties." NRS §
13 480.360(3); NRS § 706.171(1)(d).

14 The Government contends the stop at issue falls within Nevada's statutory
15 administrative warrantless inspection scheme. The Government further contends in its
16 post-hearing brief that, "the general validity of the [NAS level III] inspection of tractor-
17 trailers is not in question in this case." (Dkt. no. 77 at 19.) Orozco does not challenge the
18 constitutionality of Nevada's statutory scheme or the NHP's ability to conduct a stop for
19 the purposes of an NAS level III inspection.²

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21 ²Orozco does state that the CFR provisions adopted in Nevada are promulgated
22 by the Federal Motor Carrier Safety Administration ("FMCSA"), which has adopted the
23 North American Standard Inspection Program ("NASIP"), and that the NASIP procedures
24 were not at issue in *Delgado*. (Dkt. no. 64 at 3-4.) Orozco thus asserts that the
25 constitutionality of Nevada's NAS level III inspection procedure has not been ruled on by
26 the Ninth Circuit. Orozco points out that a similar procedure was found to be
27 constitutional under the *Burger* analysis in the Eighth Circuit. (*Id.* (citing *United States v.*
28 *Mendoza Gonzalez*, 363 F.3d 788 (8th Cir. 2004)). However, Orozco does not present
any argument as to why the relevant administrative inspection procedure in Nevada may
be unconstitutional under *Burger*. Indeed, Orozco concedes that he "assumes this Court
. . . would find" a NAS level III stop carried out by a certified NHP officer to be
constitutional. (Dkt. no. 64 at 4.) The Court finds that any argument that the NHP is
without authority to carry out a NAS level III inspection has not been properly raised by
Orozco and will not be addressed.

1 **A. The Initial Stop**

2 Orozco argues that the NAS level III inspection was an impermissible pretext
3 “motivated by a desire to search for evidence of drug trafficking, rather than to conduct a
4 commercial vehicle inspection.” (Dkt. no. 76 at 2.) There is no dispute that individualized
5 suspicion was part of the reason Trooper Zehr stopped Orozco’s vehicle for an
6 administrative inspection. Trooper Zehr testified that he initiated the stop for two
7 reasons: (1) to conduct a safety inspection; and (2) because information provided by a
8 tipster indicated that a tractor trailer matching the one being driven by Orozco could be
9 carrying drugs. (Dkt. no. 74 at 24:19-25; 25:1-23.) The question is whether such dual
10 purposes render an otherwise valid administrative stop illegal.

11 Generally, an officer having dual motives does not make a warrantless search
12 pretextual, so long as it is conducted pursuant to a lawful administrative scheme with a
13 constitutionally permissible motivation. *United States v. McCarty*, 648 F.3d 820, 833 (9th
14 Cir. 2011) (citations omitted); *see also United States v. Bowhay*, 992 F.2d 229, 231 (9th
15 Cir. 1993). In the context of general administrative schemes that do not require
16 individualized suspicion, the inquiry into an officer’s motive is thus at the programmatic
17 level, and the Court will otherwise not inquire into the minds of individual officers. *City of*
18 *Indianapolis v. Edmond*, 531 U.S. 32, 45-46 (2000). The Ninth Circuit “has consistently
19 held that if the scheme under which the administrative search is conducted is
20 constitutional, the subjective motive of the individual conducting the search will not
21 invalidate the search.” *United States v. Bulacan*, 156 F.3d 963, 966-67 (9th Cir. 1998)
22 (citing *Bowhay*, 992 F.2d at 231).

23 After analyzing the relevant case law in the Ninth Circuit, the court in *McCarty*
24 holds that, regardless of their subjective beliefs, officials are able to carry out a valid
25 administrative inspection so long as “(1) the search was undertaken pursuant to a
26 legitimate administrative search scheme; (2) the searcher’s actions are cabined to the
27 scope of the permissible administrative search; and (3) there was no impermissible
28 programmatic secondary motive for the search[.]” *McCarty*, 648 F.3d at 834-35 (citations

omitted). The administrative search scheme in *Bulacan* provides an example of an improper secondary programmatic purpose. In that case, the officers performed administrative searches on entrants to a federal building. 156 F.3d at 965. The administrative search was primarily for weapons and explosives, “conducted in light of the heightened danger following the Oklahoma City bombing.” *Id.* at 968. However, the officers performing the administrative searches were also instructed to search for narcotics. *Id.* The *Bulacan* court held that “when an administrative search scheme encompasses both a permissible and an impermissible purpose, and when the officer conducting the search has broad discretion in carrying out the search, that search does not meet the Fourth Amendment’s reasonableness requirements.” *Id.* at 973 (emphasis added). Thus, “[c]entral to *Bulacan*’s holding was that the search scheme itself imposed an additional, impermissible motive unrelated to administrative purposes, such that individual officers, in exercising the broad discretion granted them, could conduct more extensive searches based on the secondary law enforcement-related motive.” *McCarty*, 648 F.3d at 833 (emphasis added) (citing *Bulacan*, 156 F.3d at 971, 973.).

In this case, the constitutionality of the administrative scheme allowing for NHP officers to carry out an NAS level III safety inspection of Orozco’s tractor trailer is not in dispute. Orozco does not argue that Trooper Zehr’s initiation of the stop of Orozco’s tractor trailer was itself outside of the scope permissible pursuant to an NAS level III safety inspection. Finally, and most crucially, Orozco fails to show that the administrative inspection scheme contained an impermissible secondary programmatic purpose. Orozco asserts that Troopers Zehr and Boynton testified that the use of an administrative stop to pursue an investigation “is a recognized and established practice by the Nevada Highway Patrol” and “an established and proper practice.” (Dkt. no. 76 at 2, 6.) However, Orozco mischaracterizes the testimony to which he cites. The relevant testimony from Trooper Boynton is that it is “common knowledge” that Troopers Zehr and Boynton can use their administrative inspection ability to stop a truck that they also believe to be involved in criminal activity. (Dkt. no. 75 at 216:7-17.) Trooper Boynton

1 testifies to this after clearly stating that Orozco's tractor trailer was stopped both for an
2 administrative inspection and because they believed it was transporting drugs. (*Id.* at
3 215:22-25; 216:1-6.) The Court finds no evidence in this case that NHP officers are
4 trained or instructed to investigate criminal activity while carrying out an administrative
5 inspection, or that such an investigation is a part of the relevant administrative scheme.
6 Further, there is no evidence that Troopers Zehr and Boynton were instructed to
7 investigate criminal activity while carrying out their administrative inspection duties. The
8 Court therefore determines that, although there were dual purposes in Trooper Zehr's
9 initiation of the stop, there was no impermissible purpose at the programmatic level that
10 would render an otherwise permissible initiation of an NAS level III safety inspection
11 invalid.³

12 To hold otherwise would lead to an illogical result. Orozco is in effect asking the
13 Court to find that Troopers Zehr and Boynton could have stopped any commercial motor
14 vehicle for an NAS level III safety inspection without individualized suspicion *except*
15 those vehicles suspected of criminal activity as in this case. The Ninth Circuit has
16 considered and rejected this argument: "Tsai essentially asks us to conclude that the
17 customary, relatively uninvasive warrantless search that he underwent would be
18 permissible with respect to any passenger *except* those whom the INS had cause to
19 suspect of criminal activity. But this would turn customary Fourth Amendment reasoning
20 on its head." *United States v. Tsai*, 282 F.3d 690, 695 (9th Cir. 2002).

21 As Orozco has failed to demonstrate an impermissible secondary purpose,
22 Orozco's "pretext" argument must be premised on a finding that law enforcement
23 stopped Orozco's truck for the sole purpose of searching for evidence of criminal
24 activity.⁴ The record does not support such a finding, however. Orozco points out that

25 ³It may be argued that NHP officers should not conduct administrative safety
26 inspections precisely because they are tasked with looking for criminal activity and thus
27 necessarily extend the scope of the inspection beyond that of a dedicated safety
inspector. That argument, however, is not presented by Orozco.

28 ⁴Orozco cites to *Whren v. United States*, 517 U.S. 806, 811-12 (1996), which
explains that a warrant and probable cause are required where a search is not made for
(*fn. cont...*)

1 the officers involved in the inspection and search of Orozco's tractor trailer did not
 2 mention the tip of possible drug activity in any of their reports. (Dkt. no. 76 at 6.) Orozco
 3 surmises that the "only reasonable conclusion to draw from law enforcement's willful
 4 concealment of the reason for the stop is Orozco's contention that the secrecy was
 5 intended to hide the pretextual use of administrative authority and ensuing violation of
 6 the Fourth Amendment." (*Id.*) This argument presumes, without support, that the
 7 administrative inspection was pretextual to begin with. Even if the Court were to assume
 8 that the officers intended to cover up their impermissible motive, that does not discredit
 9 Trooper Zehr's testimony that an NAS level III safety inspection was at least in part the
 10 reason for the stop.

11 That an NAS level III safety inspection was in part the reason for the stop is borne
 12 out by the officers' conduct in initiating the stop. Trooper Zehr testified that he received
 13 his certification and training in conducting NAS level III inspections. (Dkt. no. 74 at 14.)
 14 Trooper Boynton also testified that he is authorized to conduct NAS level III inspections.
 15 (Dkt. no. 75 at 172.) Both testified they have conducted such inspections in the past.
 16 (Dkt. no. 74 at 14; dkt. no. 75 at 172.) Trooper Zehr describes an NAS level III safety
 17 inspection as "a driver paperwork safety inspection consisting of many documents that
 18 the Feds regulate in the trucking industry." (Dkt. no. 74 at 15:4-16.) Such paperwork
 19 includes driver logbooks, which "recreate their duties throughout the day." (*Id.*) According
 20 to Trooper Zehr, drivers "need to, if they're operating seven days a week . . . maintain
 21 the day that they're driving, plus seven days" and be able to provide the logbooks "to law
 22 enforcement who are doing the inspections," along with logbook history. (*Id.*) Records

23
 24 (*... fn. cont.*)

25 the purpose of an inventory or administrative regulation. In a later case, also cited by
 26 Orozco, the Supreme Court of the United States cites *Whren* for the proposition that
 27 exceptions to the warrant and probable cause requirements for a search "do not apply
 28 where the officer's purpose is *not* to attend to the special needs or to the investigation for
 which the administrative inspection is justified." *Ashcroft v. al-Kidd*, 131 S.Ct. 2074, 2081
 (2011) (emphasis added) (citing *Whren*, 517 U.S. at 811-12). *Whren* does not address
 circumstances in which an officer has both an impermissible motivation and a
 permissible administrative motivation.

relevant to the inspection must be maintained in case of a safety audit. (*Id.*) Prior to pulling Orozco over, Trooper Zehr stated that he was stopping Orozco's tractor trailer for an inspection. (Dkt. no. 74 at 24:19-21.) The officers initially positioned themselves outside of the tractor, asked some general questions of Orozco while Orozco produced paperwork, received paperwork including his logbook, looked through the logbook as well as other paperwork provided by Orozco and asked him questions related to the paperwork. (Dkt. no. 74 at 26-34; dkt. no. 75 at 176-180.) This conduct by the officers in their initial stop and interaction with Orozco does not appear to be outside the scope of a typical NAS level III safety inspection.⁵

The Court finds that the stop of Orozco's tractor trailer was permissibly initiated in part pursuant to an administrative inspection scheme and that investigation of possible criminal activity was not the sole purpose of the stop.

B. The Inspection

As the initial stop was permissible, the Court will address Orozco's second argument that the officers' conduct following the stop extended beyond the scope of the administrative inspection so as to require reasonable suspicion. The administrative exception can no longer justify continuation of a warrantless search "at the point at which the search ceases to be for the valid administrative purpose[.]" *McCarty*, 648 F.3d at 835. That is, the officers' actions must be no more intrusive than necessary to achieve

⁵Orozco cites to *United States v. Millan*, 36 F.3d 886, 890 (9th Cir. 1994) to argue that a stop is objectively pretextual "where the reasonable officers would not have made the stop absent a desire to search for evidence of more serious crime." (Dkt. no. 64 at 15.) *Millan* involved a traffic stop that required suspicion of a traffic violation to initiate. 36 F.3d at 888-89. The court in *Millan* thus found it significant that the officers initiated a traffic stop on the basis of only a small crack on the windshield, a minor safety violation, and that the Government could not establish that driving with a cracked windshield was illegal in Nevada. *Id.* The court found it further significant that the stop was suggested by an officer with no traffic enforcement responsibilities and that there was testimony by the officers that they were trained to make a traffic stop "to see if the subject is maybe committing a crime." *Id.* at 889-90. In this case, Troopers Zehr and Boynton are trained to conduct safety inspections, could do so without individualized suspicion pursuant to an administrative scheme and there is no evidence they were trained to use the safety inspection to investigate criminal activity. Indeed, Sargent Brewer testified that he provided the tipster's information to Trooper Zehr but otherwise did not tell him how to stop the vehicle or develop probable cause. *Millan* is therefore inapposite.

1 the administrative purpose. *Bowhay*, 992 F.3d at 231 (“When police conduct would have
2 been the same regardless of the officer’s subjective state of mind, no purpose is served
3 by attempting to tease out the officer’s ‘true’ motivation.”) However, officers carrying out
4 a commercial vehicle inspection may ask questions unrelated to the administrative
5 inspection without reasonable suspicion, as long as it does not prolong the detention of
6 the individual. *Delgado*, 545 F.3d at 1205 (citing *United States v. Mendez*, 476 F.3d
7 1077, 1080 (9th Cir. 2007). Thus, the task for this Court is to determine the scope of the
8 inspection and analyze if and when the officers exceeded that scope in an effort to
9 investigate criminal activity. See *McCarty*, 648 F.3d at 835.

10 Orozco submits a brief passage from the Commercial Vehicle Safety Alliance
11 (“CVSA”) website that describes an NAS level III safety inspection:

12 An examination that includes those items specified under the North
13 American Standard Level III Driver/Credential Inspection Procedure. As a
14 minimum, Level III inspections must include, where required and/or
15 applicable, examination of the driver’s license; medical examiner’s
16 certificate and Skill Performance Evaluation (SPE) Certificate; driver’s
record of duty status; hours of service; seat belt; vehicle inspection
report(s); and HM/DG requirements. Those items not indicated in the North
American Standard Level III Driver/Credential Inspection Procedure shall
not be included on a Level III inspection.

17 (Dkt. no. 64 at 5 (citing http://www.cvsa.org/programs/nas_levels.php)). Based on this
18 description, Orozco argues that the inspection “should have concluded fairly quickly” and
19 not lasted approximately one (1) hour. (*Id.*) However, this description is cursory at best. It
20 fails to explain what an “examination” of the relevant documents entails and what
21 inspectors look for when examining these documents.

22 Trooper Zehr testified that in a safety inspection, he examines logbooks for
23 violations of 49 C.F.R. § 395. (Dkt. no. 74 at 16:4-20.) Section 395, which was adopted
24 in Nevada pursuant to NRS § 706.173 and NAC 706.247(1), contains a host of
25 provisions as to the form of the logbooks and what information it must contain. 49 C.F.R.
26 § 395.8. The logbook entries must take the form of a standard grid provided in Section
27 395. *Id.* Drivers must record when they are off duty, in the sleeper berth, driving, or on
28 duty and not driving. *Id.* For each change in status, the driver must record “the name of

1 the city, town, or village, with State abbreviation[.]” *Id.* The standard grid must be filled
2 out with the date, total driving miles, tractor trailer number, name of carrier, driver’s
3 signature, 24-hour period starting time, main office address, remarks, name of co-driver,
4 total hours and shipping document number or name of shipper and commodity. *Id.*
5 Section 395 provides instructions on how to fill out the grid with the required information
6 and provides an illustrated example. *Id.* “Failure to complete the record of duty activities
7 of this section[,] . . . failure to preserve a record of such duty activities, or making of false
8 reports in connection with such duty activities shall make the driver and/or the carrier
9 liable to prosecution.” 49 C.F.R. § 395.8(e). The driver is required to retain a copy of the
10 logbook entries “for the previous 7 consecutive days which shall be in his/her possession
11 and available for inspection while on duty.” 49 C.F.R. § 395.8(k)(2). Pursuant to
12 commercial vehicle regulations, officers must therefore examine logbooks for false
13 entries or improper entries.

14 Scrutiny of the logbook for false or improper entries is important to the purpose of
15 the administrative inspection, which is to ensure commercial motor vehicles are
16 operating in compliance with safety regulations. Trooper Zehr testified that logbook
17 entries are reviewed to determine whether a driver is violating regulations as to how long
18 they may be on duty or driving before they need to spend time off duty or in a sleeper
19 birth to reset. (Dkt. no. 74 at 17:3-10; 18:5-11.) Trooper Zehr testified that a safety
20 inspection can take “[a]nywhere from 15 minutes to two hours.” (*Id.* at 19:20-24.) Orozco
21 offers no evidence to counter Trooper Zehr’s testimony about the length and scope of an
22 administrative inspection.⁶

23 Trooper Zehr testified that in their initial interaction, he questioned Orozco about
24 his logbook and checked the supporting paperwork and records to make sure they
25 confirmed what the logbook says. (*Id.* at 31:12-24.) As detailed in the fact section *supra*,
26 Trooper Zehr noticed, within the first twenty (20) minutes of his interaction with Orozco,

27 ⁶As previously noted, Orozco merely asserts that the inspection should have
28 taken less than one (1) hour. (Dkt. no. 64 at 5.)

1 that the logbooks were missing information, contained inconsistent information or flat-out
2 contradicted the provided paperwork. Trooper Zehr testified that he'd "never seen
3 anything that was so difficult to decipher and understand" as Orozco's logbook. (*Id.* at
4 50:13-15.) In particular, Trooper Zehr was confused about the amount of sleeper birth
5 time indicated in the logbook, which appeared to be inconsistent with the indicated
6 presence of a co-driver and inconsistent with the travel time indicated. (*Id.* at 36:4-19;
7 49:18-25; 50:1-3.) For Trooper Zehr, this added to his confusion over the ownership of
8 truck because, if Orozco owned the truck, Orozco would have to be paying his co-driver
9 through all that downtime. (*Id.* at 36:4-19.)⁷

10 After those first twenty (20) minutes, Trooper Zehr suspected criminal activity and
11 spoke to Trooper Barney about a canine search. It is at this stage, Orozco argues, that
12 the officers shifted their primary focus to investigating criminal activity.⁸ (Dkt. no. 64 at 7,
13 9-10, 14.) However, Trooper Zehr testified that Trooper Barney was already within a mile
14 and he did not instruct Trooper Barney to have the canine conduct a sniff at that time.
15 (*Id.* at 53-54.) He also testified that at this stage the safety inspection was still ongoing.

16 ⁷At the evidentiary hearing, the Government offered copies of Orozco's logbook
17 entries as exhibits and Trooper Zehr explained aspects of the entries that he found to be
18 confusing. On cross-examination of Trooper Zehr, Orozco's counsel solicited testimony
19 to demonstrate possible explanations for some of the entries that confused Trooper
20 Zehr. However, such explanations do not affect the Court's analysis. For example,
21 regarding April 20, 2013, Trooper Zehr testified that he could not figure out why Orozco
22 and his co-driver had separate entries that said Orozco was in the sleeper berth and his
23 co-driver was off duty at the same time for the same seventeen-hour (17) period instead
24 of alternating shifts, though the entries also indicated they were carrying a load of
25 perishable pears from Washington to Nogales, AZ, at that time. (Dkt. no. 74 at 49-50;
26 161-62; dkt. no. 80, Exh. 3c.) On cross-examination, Trooper Zehr testified that Orozco's
27 sleeper berth time on the 20th appeared to be recorded in Grandview, Washington,
28 which was Orozco's place of residence at the time. (Dkt. no. 74 at 134-35.) Orozco's
counsel suggested that Orozco could have made a mistake and recorded time home in
bed as sleeper berth time. (*Id.*) Even if the Court accepts that Orozco made this mistake,
however, that does not discredit Trooper Zehr's testimony that he found the entries to be
confusing. In fact, such a mistake on Orozco's part in filling out his logbook further
demonstrates that officers had to spend time questioning Orozco about his entries in
order to ensure driving time was not being concealed and entries were not being
falsified.

⁸Orozco states that after the first fifteen (15) minutes, "the NAS level III inspection
was at best a secondary consideration" (Dkt. no. 64 at 7, 9-10.) As previously
noted, however, the mere presence of dual purposes does not make the administrative
inspection illegal.

1 (*Id.* at 56:8-10.) During the ten (10) minutes or so that Trooper Zehr was speaking to
2 Trooper Barney and running Orozco's license and criminal check, Trooper Boynton was
3 apparently still talking with Orozco about the logbook, which he only received for
4 personal examination after Trooper Zehr stepped away from the tractor to speak to
5 Trooper Boynton. (*Id.* at 54:15-24; dkt. no. 75 at 179-180.) When Trooper Boynton
6 returned to Trooper Zehr's car after speaking with Orozco for those ten (10) minutes,
7 Trooper Boynton expressed confusion to Trooper Zehr over the information Orozco had
8 provided him as to the co-driver. (Dkt. no. 75 at 193:5-13.) As detailed in the fact section
9 *supra*, in the next thirty (30) minutes of the inspection, Trooper Boynton went back to
10 speak to Orozco in another attempt to clarify the inconsistencies regarding the co-driver;
11 and Trooper Barney spoke on the phone with EPIC to try and sort out the confusion over
12 the ownership of the truck and obtained information on where the tractor trailer had
13 been. Trooper Barney received information from EPIC about a border crossing that
14 conflicted with Orozco's logbooks and Trooper Boynton then questioned Orozco about
15 that discrepancy. During this time, Trooper Zehr was making preparations to ask for
16 consent to search the tractor trailer and was also finishing up the inspection paperwork
17 and waiting for information from Troopers Barney and Boynton. (Dkt. no. 74 at 72:2-6.)

18 This chain of events indicates that the officers were still investigating false entries
19 in Orozco's logbook up until Trooper Zehr finished the inspection paperwork and
20 returned the inspection documents to Orozco. Numerous problems with the logbook
21 were indeed discovered in the first twenty (20) minutes, but Defendant has offered no
22 evidence to suggest that further inquiry into those problems over the course of the next
23 forty (40) minutes was outside of the scope of an NAS level III safety inspection. Trooper
24 Zehr testified that if he had issued Orozco violations for the improper form and manner of
25 the logbook entries and the false entries, Orozco would have been put immediately out
26 of service for ten (10) hours. (*Id.* at 164:1-19.) Because of the immediate adverse impact
27 of a citation, it makes sense that inspectors would take the time to question drivers about
28 potential false entries and confirm with outside intelligence units before issuing a

1 violation.⁹ Trooper Zehr's actions in preparation for a possible search of the tractor trailer
2 occurred simultaneous to Troopers Boynton and Barney's inspection efforts and
3 therefore did not necessarily extend the scope of the inspection.¹⁰ See *McCarty*, 648
4 F.3d at 838-39; *Delgado*, 545 F.3d at 1205.

5 Once Trooper Zehr decided not to issue any violations, the inspection certainly
6 concluded as there was no longer an administrative purpose. He testified that he filled
7 out the inspection form, without any violations indicated, at the conclusion of the
8 inspection. (Dkt. no. 74 at 85:17-25; 86:1-7.) Following the completion of the inspection,
9 Trooper Zehr asked Orozco for consent to search his tractor trailer.

10 Based on the evidence presented, the Court finds that the officers' inspection did
11 not exceed the scope of the administrative scheme. While the officers were preparing for
12 a possible search beyond the administrative inspection, those preparations and inquiries
13 occurred as members of the team were still carrying out a lawful ongoing inspection. The
14 officers' actions, including Trooper Zehr's observations about Orozco's demeanor and
15 the odor in Orozco's tractor, Trooper Boynton's inquiry about the images of saints in
16 Orozco's tractor, Trooper Zehr's discussions with Trooper Barney about arranging for a
17 canine sniff, Trooper Zehr's discussions with his Sargent about how to approach the
18 search following the inspection, and Trooper Zehr's request to the other officers to leave
19 the area before he asks for consent did not exceed the scope of the administrative
20 inspection that was still ongoing. See *McCarty*, 648 F.3d at 838-39; *Delgado*, 545 F.3d
21 at 1205.

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23 ⁹This conclusion is based in large part on the testimony that the logbook entries
24 were missing required information, contained inconsistent information and were uniquely
25 difficult to understand. Such a lengthy inspection may not be warranted where a driver's
logbook clearly complies with federal regulations.

26 ¹⁰Trooper Boynton testified that he did speak with Orozco about the saints visible
27 in his tractor, which is a discussion that could not possibly be related to the purpose of
28 the administrative inspection. (Dkt. no. 75 at 195.) However, at that point the inspection
was ending and Trooper Boynton told Orozco that Trooper Zehr was finishing the
inspection paperwork. (*Id.*) This discussion as to the saints therefore did not extend the
scope of the inspection.

C. The Consent to Search

After the inspection concluded, the officers could no longer rely on administrative authority to search Orozco's tractor trailer and needed Orozco's consent to carry out the warrantless search. See *Whren*, 517 U.S. at 811-12. Troopers Zehr and Boynton obtained Orozco's verbal consent and his signature on a consent to search form. Orozco's final argument challenges this consent.

To be valid, a consent to a warrantless search must be voluntary. *United States v. Kaplan*, 895 F.2d 618, 622 (9th Cir. 1990). In evaluating whether consent to a search is voluntary, the Court must consider: (1) whether defendant was in custody; (2) whether the arresting officers had their guns drawn; (3) whether *Miranda* warnings were given; (4) whether the individual was told he had the right not to consent; and (5) whether the individual was told that a search warrant could be obtained. *United States v. Cormier*, 220 F.3d 1103, 1112 (9th Cir. 2000).

Applying these factors, the Court concludes that consent was voluntary. The Court has reviewed the video of the interaction provided by Orozco. (Dkt. no. 64, Ex. D.) Immediately after answering Orozco's final questions about the inspection paperwork, Trooper Zehr proceeded to ask for his consent to search the tractor trailer. At the time of the search, Orozco was not in custody and the arresting officers did not have their guns drawn. Orozco did not receive *Miranda* warnings, but he was not yet in custody so such warnings were not required. The written consent to search form provided to Orozco, which he signed, stated that he had the right to refuse to consent to the search and to refuse to sign the form. (Dkt. no. 80, Exh. 4.) Orozco was not told that a search warrant could be obtained.

Orozco argues that his consent was not voluntary because he was asked one hour after the initial stop, English is not his native tongue, he "exhibited confusion" with the paperwork he was provided, and he did not complete the consent to search form as directed by Trooper Zehr. (Dkt. no. 76 at 10.) Although the officer asked his consent following a proper administrative inspection that lasted approximately an hour, the video

1 reveals that the officers do not exhibit any force and Orozco appears to be relaxed and
2 comfortable in dealing with the officers. The Court agrees that, from the video, it appears
3 as though English is not Orozco's native language and he speaks with an accent,¹¹ but
4 disagrees that he was confused about the consent to search form or Trooper Zehr's
5 instructions for filling it out. Looking at the tape, Orozco is instructed to read the form and
6 appears to do so for roughly 10 seconds from timestamp 17:44:15 to 17:44:25. Orozco
7 tells the officers that he understands the English portion but understands the Spanish
8 portion better. Orozco again takes the time to read the form for roughly twenty (20)
9 seconds from 17:44:50 until 17:45:10. He then tells the officers that he thinks it's ok,
10 points to the English portion that had been filled out by Trooper Zehr and confirms he
11 can sign that portion. He then signs the English portion. Orozco never indicated that he
12 did not understand the form. While the officers could have read the form to Orozco, the
13 officers could have reasonably concluded that such a step was not warranted because
14 Orozco told the officers he understood the form.¹²

15 Lastly, Orozco argues that the consent to search form uses the verb "registren,"
16 which, according to the Court translator, could also mean "to register" or "to view." (Dkt.
17 no. 76 at 10.) In the past, however, the Ninth Circuit has affirmed a district court's
18 determination, based on the testimony of a court translator, that in the context of the
19 consent to search form, "registren" means "to search." *United States v. Rojas-Millan*, 234
20 F.3d 464, 470 (9th Cir. 2000).

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23 ¹¹Trooper Zehr testified, however, that he had no difficulty communicating with
24 Orozco in English. (Dkt. no. 74 at 30:6-11.) While the Court agrees with Orozco that his
25 ability to communicate with the officers does not necessarily mean he understands the
communication about consent to search, which may be a foreign concept to him as a
non-native English speaker, the evidence in this case does not support his claim that he
did not understand that he was giving the officers consent to search his vehicle.

26 ¹²The form states that Orozco gives his consent to Trooper Zehr and Trooper
27 Boynton to search any "luggage containers or items located in the interior and/or exterior
28 of the vehicle." (Dkt. no. 80, Exh. 4.) Orozco's consent thus apparently gave the officers
a valid basis to look inside the black duffle bag that contained the alleged illegal
substances. (Dkt. no. 31 at 19.)

1 The Court concludes that Trooper Zehr stopped Orozco in part pursuant to a
2 proper administrative purpose, that his actions in making preparations for a canine sniff
3 and consent request did not cause officers to exceed the scope of the administrative
4 inspection, and that following the conclusion of the inspection Orozco gave a valid
5 consent to search. The Motion is therefore denied.

6 **IV. CONCLUSION**

7 The Court notes that the parties made several arguments and cited to several
8 cases not discussed above. The Court has reviewed these arguments and cases and
9 determines that they do not warrant discussion as they do not affect the outcome of this
10 Order.

11 It is therefore ordered that Defendant's Motion to Suppress Evidence and
12 Statements (dkt. no. 31) is denied.

13 DATED THIS 28th day of January 2015.

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16 MIRANDA M. DU
17 UNITED STATES DISTRICT JUDGE
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